

1979 December 17

[TRIANTAFYLIDIS, P., L. LOIZOU, HADJIANASTASSIOU,
MALACHTOS, DEMETRIADES, JJ.]

BMS VIOMICHANIAI METALLIKON SOLINON LTD.,
Appellants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE COMMISSIONER OF STAMP DUTY AND ANOTHER,
Respondents.

(*Revisional Jurisdiction Appeal No. 204*).

Stamp duty—Several instruments—Employed for completing one and the same transaction—Loan agreement, floating debenture and mortgages—Loan agreement the principal instrument—Only principal instrument can be charged with the maximum of the stamp duty entailed by any of such instruments—Other instruments to be treated as secondary documents—But instruments merely consequential to above agreement to be treated as separate documents—Section 5(1) of the Stamp Law, 1963 (Law 19/63) and proviso to section 5(2) of the Law. 5

The appellant company ("the company") was granted certain financial facilities by a Bank; and in order to secure to the bank these facilities it executed a floating debenture and procured the registration of three mortgages. One such mortgage affected property of the company and the other two mortgages property of the Paphos Bishopric and of Ayios Neophytos Monastery, respectively, which were shareholders in the company. A memorandum of agreement* was then prepared giving details of the financial facilities and of the said debenture and mortgages. When respondent 1 was asked to determine the stamp duty chargeable on the memorandum of agreement and the instruments referred to therein he decided that the debenture was the principal instrument and was chargeable under section 12(e) of the First Schedule to the Stamp Law, 1963 (Law 19/63) 10
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* The relevant part of the memorandum is quoted at pp. 703–704 *post*.

and not ad valorem and the memorandum was the secondary one and was chargeable under section 5* of the Law. He further decided that the three mortgages were principal instruments and were, also, chargeable under the said section 12(e).

5 There followed correspondence between the company and the Commissioner whereby the company treated the memorandum of agreement as the principal instrument and the Commissioner accepted it as such.

10 In a recourse against the validity of the above decision the trial Judge found that all the three mortgages were principal instruments chargeable under item 12(e) of the Schedule to the Stamp Law, 1963 (Law 19/63) and that they were not secondary instruments forming together with the memorandum of the loan agreement one transaction in the sense of section 15 5(1) of the said Law, so that they could escape the ad valorem stamp duty.

Upon appeal by the company:

20 *Held*, (1) that the memorandum of the loan agreement, which was treated by the parties thereto as the principal instrument, and was, also, accepted as such by the Commissioner of Stamp Duty and the floating debenture, as well as the mortgage created by the company on its property come within the provisions of section 5(1) of Law 19/63, in the sense that they are "several instruments" employed for completing one and the same transaction; that the principal document, namely the memorandum 25 of the agreement for the loan, should be charged with the maximum of the stamp duty entailed by any of the three aforesaid documents, that is C£900 which is payable in relation to the mortgage and the other two documents should be treated as

* Section 5 provides as follows:

"5.(1) Where in the case of any agreement or memorandum of agreement several instruments are employed for completing the transaction (whether executed at the same time or at different times) the principal instrument only shall be chargeable with the duty specified in the First Schedule for the agreement or memorandum of agreement aforesaid, and each of the other instruments shall be chargeable with a duty of two hundred *mils* instead of the duty (if any) specified for it in that Schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purpose of subsection (1), be deemed to be the principal instrument:

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed".

secondary documents in the sense of subsection (1) of section 5 (see proviso to section 5(2) of Law 19/63).

(2) That regarding the other two mortgages, which are envisaged by the memorandum of the loan agreement, this Court is in agreement with the trial Judge that they are separate documents, because they do not form part of one and the same transaction, which came into existence by virtue of the memorandum of the loan agreement; that they are transactions consequential to such agreement but, in the circumstances of this case, separate from it; that, therefore, the appeal must be dismissed and the decision of the respondent Commissioner of Stamp Duty is confirmed only in so far as the stamp duty payable in relation to the mortgages created by the Paphos Bishopric and the Ayios Neophytos Monastery are concerned and it is otherwise allowed.

Appeal partly allowed.

Cases referred to:

Russel v. Commissioners of Inland Revenue [1902] 1 K.B. 142.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) given on the 30th December, 1978 (Revisional Jurisdiction Case No. 314/77) whereby appellants' recourse, against the decision of the respondents as regards the stamp duty payable in relation to a loan agreement dated 27th October, 1976, a floating debenture and three mortgages, which were created as a result of such agreement, was dismissed.

M. Houry with *S. McBride*, for the appellants.

A. Evangelou, Counsel of the Republic, for the respondents.

Cur. adv. vult.

TRIANAFYLIDES P. read the following judgment of the Court. In the present case the appellant company (hereinafter to be referred to as the "company") challenges a first instance judgment* of a Judge of this Court by means of which there was dismissed a recourse of the company against a decision as regards the stamp duty payable in relation to a loan agreement dated October 27, 1976, and a floating debenture and three mortgages which were created as a result of such agreement.

* Reported in (1978) 3 C.L.R. 396.

The decision in question, by the respondent Commissioner of Stamp Duty, is to be found in his two letters dated October 21, 1977, and October 31, 1977, respectively. By virtue of this decision C£800 were found to be payable as stamp duty as regards the floating debenture, C£900 as regards a mortgage on the property of the company, C£260 as regards a mortgage on property of the Paphos Bishopric, which is one of the shareholders in the company, and C£260 as regards a mortgage on property of Ayios Neophytos Monastery, which is, also, a shareholder in the company. The aforesaid two amounts of C£260 were, later, reduced to C£170 each, because originally they were computed on the mistaken basis that the Bishopric and the Monastery were corporate bodies.

The learned trial Judge has found by his judgment that all the three mortgages were principal instruments chargeable under item 12(e) of the Schedule to the Stamp Law, 1963 (Law 19/63), and that they were not secondary instruments forming together with the memorandum of the loan agreement one transaction in the sense of section 5(1) of the said Law, so that they could escape the ad valorem stamp duty.

The relevant part of the aforementioned memorandum of the loan agreement read as follows:

“(3) And in order to secure to the Bank these additional facilities, the Company offered to the Bank:—

(a) to execute a second floating debenture (herein referred to as ‘the second debenture’) in the terms of the annexed draft, charging all its property, movable and immovable whatsoever and wheresoever present and future and its uncalled capital and goodwill, for a capital sum of £400,000 (Four hundred thousand pounds) and a second priority mortgage charging its land factory and machinery installation at Ayia Varvara Paphos donated by Certificate of Registration No. 4047 dated 2.9.76, for a capital sum of £450,000 (Four hundred and fifty thousand pounds) on the Bank’s printed form of mortgage bonds (166 GBF) and on the terms and conditions therein contained.

(b) to procure the registration by the Bishopric of Paphos of a first priority mortgage in the capital sum of

£130,000 (One hundred and thirty thousand pounds) on the Bank's printed form (155 GBF/a) charging its property consisting of 339 donums 3 evleks and 2400 sq. ft. of land at Alima Peyia, Paphos.

- (c) to procure the registration by the Ayios Neophytos Monastery of a first priority mortgage for a capital sum of £130,000 (One hundred and thirty thousand pounds) charging its field consisting of 61 donums 1 evlek and 1600 sq. ft. with all vines and citrus grown thereon at Sotira Achelia, Paphos district and 433 donums and 3 evleks of fields at Teratsin Ayia Varvara, Paphos district. 5 10
- (d) to procure the joint and several guarantee for a capital sum of £400,000 (Four hundred thousand pounds) by the Bishopric of Paphos and Ayios Neophytos Monastery on the Bank's printed form (CG/a)." 15

Section 5 of Law 19/63 is similar, though not identical, to section 106 of the Stamp Act, 1891, in England (see Halsbury's Statutes of England, 2nd ed., vol. 21, p. 644, and, also, Halsbury's Laws of England, 3rd ed., vol. 33, p. 277, para. 494). 20

It is useful to rely on the way in which section 106 of the Stamp Act, 1891, in England, has been applied, even though it is no longer in force there since it has been repealed by the Finance Act, 1962. A case which may be cited in this connection is *Russel v. Commissioners of Inland Revenue*, [1902] 1 K.B. 142, where it was held that where the trusts of a share of certain property were revoked by one instrument and the share re-settled by an instrument of the same date, that was not a case coming within the provisions of subsection (1) of section 106 of the Stamp Act, 1891, which corresponds to subsection (1) of section 5 of Law 19/63; in delivering judgment in that case Collins M.R. stated the following (at p. 152): 25 30

"Another point was taken to which I ought to refer, namely, that this case falls within the terms of s. 106 of the Stamp Act, 1891, which provides that, where several instruments are executed for effecting the settlement of the same property, and the ad valorem duty chargeable in respect of the settlement of the property, exceeds 10s., one only of the instruments is to be charged with the ad valorem duty. 35

I think that this point was effectively met by the answer given by the counsel for the Crown, who said that the section contemplated one transaction by way of settlement of property effected at the same time by several documents, not a series of documents effecting at different stages different dispositions with regard to settled property. I do not think the Legislature could have intended by that section to embrace the case of a settlement giving a power of revocation and appointment which is subsequently executed so as to effect what is really a fresh settlement. If the view of s. 106 contended for by the appellant were correct, there would seem to have been no need for the exemption contained in the schedule.”

Having given careful consideration to the application of section 5 of Law 19/63 to the particular circumstances of the case now before us, we have reached the conclusion that the memorandum of the loan agreement, which was treated by the parties thereto as the principal instrument, and was, also, accepted as such by the Commissioner of Stamp Duty (see his letter of October 31, 1977) and the floating debenture which is referred to in the abovequoted clause 3(a) of the loan agreement, as well as the mortgage created by the company on its property for the sum of C£450,000, come within the provisions of section 5(1) of Law 19/63, in the sense that they are “several instruments” employed for completing one and the same transaction.

It is useful, at this stage, to quote in full the text of section 5, which reads as follows, in English translation:

“5.(1) Where in the case of any agreement or memorandum of agreement several instruments are employed for completing the transaction (whether executed at the same time or at different times) the principal instrument only shall be chargeable with the duty specified in the First Schedule for the agreement or memorandum of agreement aforesaid, and each of the other instruments shall be chargeable with a duty of two hundred mils instead of the duty (if any) specified for it in that Schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purpose of subsection (1), be deemed to be the principal instrument:

“ Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.”

In view of the proviso to subsection (2) of section 5, the principal document, namely the memorandum of the agreement for the loan, should be charged with the maximum of the stamp duty entailed by any of the three aforesaid documents, that is C£900 which is payable in relation to the mortgage and the other two documents should be treated as secondary documents in the sense of subsection (1) of section 5. 5 10

As regards the other two mortgages, which are envisaged by paragraphs (b) and (c) of clause 3 of the memorandum of the loan agreement, we agree with the learned trial Judge that they are separate documents, because they do not form part of one and the same transaction, which came into existence by virtue of the memorandum of the loan agreement; they are transactions consequential to such agreement but, in the circumstances of this case, separate from it. 15

As a result, the appeal is dismissed and the decision of the respondent Commissioner of Stamp Duty is confirmed only in so far as the stamp duty payable in relation to the mortgages created by the Paphos Bishopric and the Ayios Neophytos Monastery are concerned and it is otherwise allowed; thus, the decision to impose C£800 stamp duty on the floating debenture and C£900 on the mortgage of the property of the company is annulled, subject of course, to the said amount of C£900 being imposed as stamp duty on the memorandum of the loan agreement. 20 25

In the light of all the circumstances of this case we have not thought it fit to make any order as to its costs. 30

Appeal partly allowed. No order as to costs.